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IN THE COURT OF APPEALS OF INDIANA

JASON MICHAEL MALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 90A02-0608-CR-665
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0403-FA-2

April 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jason Michael Mall ("Mall") appeals his convictions and sentence for two counts of child molesting, Class A felonies.[1] We affirm.

Issues

Mall presents three issues for review:

I. Whether the admission of evidence of uncharged acts of molestation was fundamental error;

II. Whether Mall was sentenced in contravention of his Sixth Amendment rights; and

III. Whether the fifty-year aggregate sentence is inappropriate.

Facts and Procedural History

In 1999, Mall married Sondra Thompson ("Sondra") and adopted her six-year-old daughter K.M. Shortly thereafter, Mall began to fondle K.M.'s breasts. Over the next few years, Mall and Sondra had two children together. They worked opposite shifts, and Mall was sometimes responsible for the care of the three siblings.

When K.M. was in elementary school, she got home just before Mall left for work on the second shift. Mall developed a pattern of calling K.M. into his bedroom as soon as she had gotten off the school bus and "put her stuff down." (Tr. 216.) Mall forced K.M. to engage in anal intercourse approximately three times weekly. She estimated that there were over one hundred incidents in total. Prior to the incidents of anal intercourse, Mall typically compelled K.M. to get on her knees so that Mall could hold her head and place his penis into her mouth. Mall twice inserted his penis into K.M.'s vagina, but stopped when she cried.

Mall also inserted a dildo and his finger into K.M.'s anus, licked K.M.'s vagina, and inserted his finger into her vagina and "moved it back and forth." (Tr. 225.)

On March 9, 2004, when she was in the fifth grade, K.M. attended an elementary school program about body safety. The children were provided with forms by which they could request to speak with someone in law enforcement if they so desired. K.M. indicated that she wanted to speak with an officer. She then disclosed that Mall had molested her.

Mall was charged with two counts of child molesting as Class A felonies, one count alleging that Mall had sexual intercourse with K.M. when she was less than fourteen years old and one count alleging that he committed deviate sexual conduct with K.M. Mall's jury trial commenced on June 12, 2006. On June 15, 2006, he was convicted as charged. On July 13, 2006, Mall was sentenced to fifty years imprisonment on each count, with the sentences to be served concurrently. He now appeals.

Discussion and Decision

I. 404(b) Evidence

Mall contends that the trial court admitted evidence in violation of Indiana Evidence Rule 404(b) when K.M. testified that Mall had committed acts against her other than those charged.

The admission of evidence of uncharged bad conduct is constrained by Indiana Rule of Evidence 404(b), which provides in relevant part as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

[1] Ind. Code § 35-42-4-3.

> however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Evidence of extrinsic offenses poses the danger that the jury will convict the defendant because he is a person of bad character generally, or has a tendency to commit crimes. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). The rationale for the prohibition against bad act and character evidence is "predicated upon our fundamental precept that every defendant should only be required to defend against the specific charges filed." Oldham v. State, 779 N.E.2d 1162, 1773 (Ind. Ct. App. 2002), trans. denied.

To decide whether character evidence is admissible under Evid. R. 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. Bassett, 795 N.E.2d at 1053.

The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission, and the trial court's ruling will be reviewed only for an abuse of discretion. Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999). A decision by the trial court to admit evidence will be reversed only upon a showing of a manifest abuse of discretion that resulted in the denial of a fair trial. Id. at 80.

At trial, Mall failed to lodge an objection based upon Rule 404(b). Failure to contemporaneously object to the trial court's decision to admit evidence generally means that a party has not preserved any claim for appeal. Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003). The fundamental error exception to this rule permits reversal when there has been a

blatant violation of basic principles that denies a defendant fundamental due process. Id. As a general rule, the erroneous admission of evidence of extrinsic acts does not constitute fundamental error. Williams v. State, 634 N.E.2d 849, 854 (Ind. Ct. App. 1994).

"Evidence of uncharged misconduct which is probative of the defendant's motive and which is inextricably bound up with the charged crime is properly admissible under [Evidence Rule] 404(b)." Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003) (internal quotations omitted). Here, the challenged evidence was not introduced merely to show Mall's propensity to engage in crime. Although the State decided to charge Mall with only two crimes, the evidence of his other acts against K.M. was inextricably bound up with the charged crimes. Mall was not denied fundamental due process.

II. Alleged Blakely Error

At the time of Mall's offenses, Indiana Code Section 35-50-2-4 provided that a person who committed a Class A felony should be imprisoned for a fixed term of thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. In imposing an aggregate sentence of fifty years, the trial court found Mall's lack of criminal history to be a mitigating circumstance and found the following aggravating circumstances: the harm to K.M. was greater because there were multiple offenses; K.M. was several years younger than fourteen, the statutory element elevating the offenses to Class A felonies;[2] Mall had the care, custody and control of K.M.; K.M. was placed in fear; and Mall showed no remorse.

Mall contends that his sentence was imposed in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g. denied 125 S. Ct. 21 (2004). The Blakely court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

[2] See I.C. 35-42-4-3(a)(1), providing that child molesting is a Class A felony if committed by a person at least twenty-one years of age against a person under age fourteen.

In Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005), our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. The Court has subsequently clarified that a sentence may be enhanced upon facts that "are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005). Here, the jury found that Mall had committed two offenses against K.M. Thus, the trial court's determination that she suffered increased harm from multiple offenses derived from the jury verdicts rather than independent fact-finding. Mall admitted that he adopted K.M. and was entrusted with her care.[3] Too, he admitted that K.M. was less than fourteen years old. Although a material element of the offense of which one is convicted may not be relied upon as an aggravating circumstance, a sentencing court could appropriately consider the particularized circumstances of the criminal act as aggravating. See Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988). The facts found by a jury or admitted by Mall do not violate Blakely. However, we cannot conclude based upon the record before us that the jury found, or Mall admitted, a lack of remorse or that he placed K.M. in fear.

[3] The defendant need not admit the precise language of the aggravating circumstance; rather, the critical inquiry for Sixth Amendment purposes is whether the facts that underlie and support the aggravating factor were admitted by the defendant or found by a jury. See Morgan v. State, 829 N.E.2d 12, 17-18 (Ind. 2005).

When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. Merlington v. State, 814 N.E.2d 269, 273 (Ind. 2004). We may affirm if the sentencing error is harmless. Id. Our Indiana Supreme Court has observed that one valid aggravating circumstance adequately supports ordering consecutive sentences, and that Blakely is not implicated by the trial court's decision to impose consecutive sentences. See Williams v. State, 827 N.E.2d 1127, 1128 (Ind. 2005). Accordingly, if the trial court's consideration of some facts permissible under Blakely, together with non-permissible facts, leads to the imposition of an aggregate term that could have been imposed as consecutive sentences, the sentencing error is harmless. Here, Mall could have received consecutive sentences amounting to one hundred years. In light of Mall's multiple offenses against K.M., commenced when she was very young, in violation of his position of trust as her adoptive father, we can say with confidence that the trial court would have imposed the same sentence absent consideration of Mall's lack of remorse and intimidation of K.M. A remand for the consideration of only Blakely-permissible facts is not required.

III. Appropriateness of Sentence

Mall also argues that his sentence is inappropriate in light of his character and the nature of the offenses. In particular, he points out that he has no criminal history.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by

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"Sixth Amendment rights are not implicated when the language of an aggravator is meant to describe the factual circumstances, not to serve as a fact itself." Id. at 17.

statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Mall was convicted of multiple offenses against K.M. Concerning the nature of these offenses, we observe that Mall began to molest K.M. almost immediately after marrying her mother. He began to fondle then six-year-old K.M., apparently to groom her for future sexual activity. K.M.'s experience as the adopted daughter of Mall was that she would get home from elementary school, alight from the school bus, put her books down and be summoned into Mall's bedroom to be victimized. She described the level of pain endured as an eight on a scale of one to ten.

The character of the offender is such that he had no prior criminal convictions. However, his character was also such that he took advantage of his role as a parent, and his knowledge of K.M.'s weakness. Mall was willing to victimize K.M. knowing that she had a heart defect for which she had endured multiple surgeries. Mall also committed his crimes when his other pre-school aged children were present in the home.

In light of the foregoing, we do not find Mall's aggregate fifty-year sentence inappropriate.

Conclusion

Mall has not demonstrated fundamental error in the admission of evidence. Nor has he demonstrated that the trial court erred in imposing sentence upon him or that his sentence is inappropriate.

Affirmed.

SHARPNACK, J., and MAY, J., concur.